

Chapter 9

9.0 SECTION 404(B)(1) EVALUATION

9.1 Clean Water Act

The Clean Water Act (CWA) of 1977 that amends the Federal Water Pollution Act of 1972 and its subsequent amendments, 33 USC Part 1251 et seq., is designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The CWA covers discharge of pollutants into navigable waters, wastewater treatment management, and protection of fish, shellfish, and wildlife. Section 404 of the CWA (33 USC Section 1344) regulates the disposal of dredged and/or fill material into "waters of the United States", including wetlands.

Section 404 of the CWA is administered by the United States Army Corps of Engineers (USACE) and the United States Environmental Protection Agency (USEPA). USACE is authorized to consider, and if appropriate, issue permits for discharge of fill activities into waters of the United States.

Activities in waters of the United States that are regulated under this statute include fills for building construction, water resource projects (such as dams and levees), infrastructure development (such as highways and airports), and conversion of wetlands to uplands for farming.

Regulated activities are subject to a USACE permit review process. An individual permit is required for regulated actions that do not qualify for general permits.

Since the development alternatives proposed by the applicant for the Empire Tract would require discharge of fill material into waters and wetlands of the United States, an individual permit is required under Section 404 of the CWA. The project proposal is also regulated under Section 10 of the Rivers and Harbors Act of 1899 (33 USC Section 403). The permit application for development proposed by the applicant on the Empire Tract was originally submitted to USACE, New York District in July 1992, and amended in July 1995 and September 1997.

9.1.1 Section 404(b)(1) Guidelines

In order to be permitted under Section 404 of the CWA, an activity must be found to be in compliance with the guidelines identified in Section 404(b)(1) of the Act. The Section 404(b)(1) guidelines, developed by USEPA in consultation with USACE, were promulgated as regulations at 40 CFR 230, and have been in place since 1980. The guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States.

The Section 404(b)(1) guidelines establish permitting criteria. The following points have bearing on the evaluation of alternatives to a proposed activity:

- 1) Except as provided under Section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences.
- 2) An alternative is practicable if it is available and capable of being completed after taking into consideration cost, existing technology, and logistics in light of overall project purposes.
- 3) In cases where the proposed project is not "water dependent," practicable alternatives that do not involve special aquatic sites (e.g., wetlands) are presumed to be available, unless clearly demonstrated otherwise (40 CFR 230-16(a)).

A fundamental requirement of the Section 404(b)(1) guidelines is mitigation sequencing. Mitigation sequencing provides that discharges into waters of the United States will generally be prohibited when the impact of such fill can be avoided by using a practicable alternative. In determining what practicable alternatives to a discharge might exist, it must be determined whether the activity is "water dependent"; that is, whether it must be conducted in an aquatic area to fulfill its basic purpose. For example, marinas or piers may require siting in waters of the United States to provide access to the water, and hence are considered "water dependent". If an activity is not water dependent, Section 404(b)(1) guidelines presume that less damaging practicable alternatives exist, and an applicant would have to demonstrate that no practicable alternatives exist. For example, a highway may not be a water-dependent activity, but the only location available for the highway to pass to achieve its purpose may be through a wetland. Multiple road alignments may have to be considered before one is chosen that minimizes wetland impacts to the extent practicable and achieves the project purpose.

The assessment of practicable alternatives based upon a project's purpose is part of the sequential mitigation process agreed upon by USACE and USEPA in a 7 February 1990 Memorandum of Agreement (MOA) on mitigation. If wetlands cannot be avoided because practicable alternatives do not exist, then adverse environmental impacts of the project must be minimized. For example, modifications may be made to the design and siting of a building to reduce the project's "footprint" in a wetland area and still achieve the project purpose. Lastly, any adverse effect that cannot be avoided or minimized must be compensated by compensatory mitigation -- restoration, creation, and/or enhancement of existing wetlands. The goal of compensatory mitigation is that overall, the project will result in no net loss of wetland functions. Compensatory mitigation projects have not always been successful in replacing the wetland functions lost to development. The science of wetlands mitigation, however, has advanced our understanding of how to make wetlands mitigation successful. In attaining a no net loss goal, it is therefore critical that a

project using compensatory mitigation to offset wetland impacts be properly designed and implemented.

The purpose of the project described in the Empire, Ltd. wetland fill permit application, a super-regional mixed-use commercial development proposed as Meadowlands Mills, is not a water-dependent use. Consequently, an alternatives analysis is required to demonstrate that no practicable alternative to Meadowlands Mills exists that is less damaging to the aquatic environment. The permit application for Meadowlands Mills has included an analysis prepared by the applicant that seeks to demonstrate that no such practicable alternative exists that will achieve the project purpose. The permit application records also include information provided by the applicant that shows (1) what steps were taken in the design of Meadowlands Mills to avoid wetland impacts where practicable; (2) how potential impacts to wetlands were minimized in the design of Meadowlands Mills; and (3) how adequate and effective compensation will be provided as part of Meadowlands Mills for any remaining, unavoidable impacts. Compensation is to be provided through activities to enhance, restore or create wetlands. The information provided also seeks to demonstrate that the project's purpose would be achieved.

Section 404(b)(1) guidelines require that the proposed activity comply with other state and federal environmental standards. Permit applications may not be approved in any of the following situations:

- if a project causes violations of state water quality standards or toxic effluent standards;
- if a project jeopardizes federally listed threatened or endangered species;
- if a project has significantly adverse impacts on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites (e.g., wetlands); or
- if a project adversely affects the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy.

9.1.2 Process to Determine 404(b)(1) Compliance

USACE New York District is currently evaluating the Section 404 permit application submitted by Empire, Ltd. After the public notice and hearing USACE received comments from other regulatory and resource agencies, such as USEPA, New Jersey Meadowlands Commission (NJMC), United States Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS), as well as comments from public interest organizations and individuals. Based on its evaluation and the comments received, USACE determined that an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) was necessary for a thorough review of environmental impacts.

Upon completion of its evaluation after the environmental review process under NEPA, USACE will issue a Record of Decision. The Record of Decision (ROD) will also address the consistency

of the application by Empire, Ltd. with Section 404(b)(1) guidelines, and explain how the USACE decision was made.